No. 16357

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant,

v.

UNITED STATES PLYWOOD CORPORATION,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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STATEMENT OF THE CASE

In this action, which was removed from the Circuit Court for Lane County, Oregon, plaintiff appeals from a judgment in his favor for $80.00 (R. 65) entered upon findings of fact and conclusions made by the court after trial before the court, a jury having been waived (R. 49-64). By an amended complaint filed on November 23, 1956 (R. 5), plaintiff sought to recover $300,000

as treble damages for alleged timber trespasses by defendant's predecessor in interest (Siuslaw Forest Products, Inc., hereinafter called "Siuslaw") and defendant upon plaintiff's lands in Lane County, Oregon.

While it was alleged therein that over 5,000,000 feet of old growth and second growth fir and hemlock trees and timber, and other species of trees and timber, were wilfully cut and removed between June 24, 1950, and August 10, 1955, the timber trespass claim was narrowed at trial to a claim for recovery on account of 850,000 feet of old growth fir, 3,125,000 feet of second growth fir, 431,000 feet of hemlock, and 8,000 feet of cedar, stipulated to have been cut and removed from the property between January 1, 1953, and December 30, 1955 (R. 488). The theory of plaintiff's action was that the timber sales agreement of May 4, 1942, between the Warlicks, then owners of the property, and Siuslaw, under which "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" was sold, did not give Siuslaw or defendant the right to cut any second growth fir and hemlock subsequent to January 1, 1953, because such timber was not "merchantable" at the time of the execution of the contract. In the alternative, plaintiff asserted that if there was any merchantable timber left on the land, defendant or Siuslaw abandoned or relinquished its interest therein prior to June 24, 1950 (R. 14-15). At the commencement of the trial, defendant's counsel conceded liability for the cutting of the cedar, not mentioned in the timber sales agreement. Following the closing of the testi-

mony and arguments, the court rendered its oral opinion (R. 494-501) limiting plaintiff's recovery to double damages of $80.00 for "cutting down five cedar trees in a tract of 400 acres" (R. 500).

The court rejected all plaintiff's other claims, although it rigidly followed the rule of *Hughes v. Heppner Lumber Company,* 205 Or. 11, 283 P.(2d) 142, 286 P.(2d) 126, that "a grant of merchantable timber is a grant only of the merchantable timber on the land as of the date of the contract" (R. 496). The court held that whether the agreement of May 4, 1942, be construed ". . . by its wording alone or whether we construe it in the light of the position of the parties" the grant of timber therein included all of the second growth fir and hemlock removed by defendant and Siuslaw.

With respect to the alternative claim that defendant or Siuslaw had abandoned or relinquished its interest in any merchantable timber left on the land on June 24, 1950 (R. 15), the court unequivocally held that there had been no abandonment of any timber. In making this determination, the court characterized defendant's principal witness on this point as "a particularly good witness," and stated that it was impressed with his testimony (R. 495).

STATUTES INVOLVED

The Oregon statute on which the amended complaint was founded is ORS 105.810:

> *"Treble damages for injury to or removal of produce, trees or shrubs.* Except as provided in ORS 477.310, whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent."

The statute on which the judgment was based is ORS 105.815:

> *"When double damages are awarded for trespass.* If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction

the act was done, or that the tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages."

SUMMARY OF ARGUMENT

1. The scope of this Court's review of the findings of fact is limited by Rule 52(a) of the Federal Rules of Civil Procedure and the decisions of this Court interpreting its mandate.

2. Those findings of fact which were not stipulated are supported by substantial evidence. To a large degree, they are dependent upon the trial court's appraisal of the credibility of oral testimony.

3. The trial court correctly applied the controlling Oregon law in connection with its factual determination that the fir and hemlock timber in question was "merchantable" in May, 1942, and that it had not been abandoned by the defendant or Siuslaw.

4. The court below correctly concluded that plaintiff by his conduct had manifested consent to the removal of the timber in question, notwithstanding the claim that he was acting pursuant to a mistaken interpretation of his contractual rights.

5. Under no circumstances could defendant be liable for treble damages, in the absence of a finding of malice and evil intent.

6. This Court should accept the experienced trial judge's interpretation of the Oregon statutes and the decisions of the Supreme Court of Oregon.

ARGUMENT

I

The scope of this Court's review is restricted by Rule 52(a) of the Federal Rules of Civil Procedure.

In his specification of errors, plaintiff complains of error with respect to thirteen separate findings of fact made by the trial court (App. br. 5-14). Since thirteen out of twenty-eight findings entered were based on stipulated facts, plaintiff complains of all findings other than these agreed facts, except Finding XV and Finding XXII (R. 56, 59-60). In most instances, it is baldly stated that there was no evidence to support the particular finding (App. br. 5, 10, 11, 13, 15). However, when the alleged errors are analyzed, it becomes clear that plaintiff's principal complaint is that the court believed the oral testimony given by defendant's witnesses and weighed the evidence in its favor.

On appeal, that view of the evidence which is most favorable to defendant must be accepted, and if, when so viewed, the findings are supported by substantial evidence, they will be sustained (*Lewis Food Company of California v. Milwaukee Ins. Co.,* 257 F.(2d) 525 (CA 9); *Elrick Rim Company v. Reading Tire Machinery Co.,* 264 F.(2d) 481 (CA 9)). Since it was within the exclusive province of the trial court to appraise the credibility of the witnesses, those findings which depend upon the credibility of oral testimony will be regarded as conclusive on appeal (*Parker v. Title & Trust Com-*

pany, 233 F.(2d) 505 (CA 9); *E. V. Prentice Machinery Company v. Associated Plywood Mills, Inc.*, 252 F.(2d) 473, cert. den. 356 U.S. 951, 78 S. Ct. 917, 2 L. Ed. 2d 844). Furthermore, it is not this Court's function to test the findings through a weighing of the evidence, or to substitute its judgment for that of the trial court, even though of the opinion that the district judge could have reached a contrary conclusion (*Kirsch v. Huber*, 264 F.(2d) 387 (CA 9)).

In view of the lower court's oral opinion rendered immediately after the close of the evidence and arguments, the statement in *Tonkoff v. Barr*, 245 F.(2d) 742 (CA 9), is pertinent (p. 750):

> "The foregoing references to the testimony make it apparent that there was substantial evidence upon which the trial court properly could make the findings he did. His short but revealing memorandum decision indicates that the trial judge considered the motives and other indicia of credibility as applied to the various witnesses and was impressed with that evidence which sustained appellees' position. Under such circumstances it is not our function to substitute our judgment for that of the trial court [citations]."

II

The trial court's findings as to the merchantability of the fir and hemlock timber on May 4, 1942, are supported by competent evidence.

In a comprehensive pretrial order, the parties framed the first issue of fact as follows (R. 19):

> "How much of the fir and hemlock timber, if any, removed by defendant and its predecessor in interest within the limitations periods applicable to this action, was not merchantable within the meaning of the May 4, 1942, contract?"

In Finding of Fact XXI (R. 59) the court found:

> "According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942."

This ultimate finding, as well as the more detailed findings on merchantability (Findings of Fact XII, XIII, XIV, XVI, XVII, R. 54-58), is challenged on the ground of lack of supporting evidence and the admission of oral testimony in violation of the Oregon parol evidence rule.

Before discussing the evidence supporting these findings, it is necessary to review briefly the controlling Oregon authorities and our agreement or disagreement with plaintiff's view of the Oregon law:

FIRST: Plaintiff utilizes nearly eight pages of his brief (App. br. pp. 21-29) to argue that under the decisions of *Hughes v. Heppner Lumber Company,* 205 Or.

11, 283 P.(2d) 142, 286 P.(2d) 126, and *Doherty v. Harris Pine Mills, Inc.,* 211 Or. 378, 315 P.(2d) 566, defendant and Siuslaw only acquired title to timber on the property which was merchantable as of May 4, 1942, the date of the timber agreement. However, there is no issue on this appeal as to the application of that rule of law. In its oral opinion the court followed these cited decisions (R. 496), and specifically found that all the fir and hemlock timber removed "was in fact merchantable on May 4, 1942" (R. 59).

SECOND: Plaintiff erroneously claims that under the Oregon decisions "merchantable" timber is "only timber which has a commercial value and which can be utilized at a profit" (App. br. pp. 20, 29). In *Monger v. Dimmick,* 187 Or. 253, 257, 210 P.(2d) 929, "merchantable timber" was defined as "all timber . . . that had . . . a commercial value in that locality for the purpose of manufacture into lumber, or for any other purpose." This definition was quoted with approval in *Hughes v. Heppner Lumber Co.* (supra), and in Doherty *v. Harris Pine Mills, Inc.* (supra). However, the plaintiff's attempted incorporation of the additional factor of utilization for a profit is absolutely contrary to Oregon law, as stated in the leading case of *Dahl v. Crain,* 193 Or. 207, 237 P.(2d) 939. There, the Oregon Supreme Court held that a timber seller was entitled to rescind for fraud a transaction based upon a so-called joint timber cruise. The court's holding was based upon the fact that the parties had agreed upon a sale of merchantable pine timber on the basis of the cruise, but the buyer had instructed the cruiser, Mr. Milius, to count

only the timber which would return a net profit to the buyer in his contemplated operation. The court held (p. 225):

> "We know of no authority, nor has any been cited to us, that defines 'merchantable timber' to be only such as that contained in the instructions given Milius."

THIRD: Appellant claims that under Oregon law the words "merchantable timber" are not ambiguous and that the trial court erred in admitting extrinsic evidence to show that the contracting parties intended those words to include all timber on the property (App. br. 17-20, 55-59). However, the decision in *Doherty v. Harris Pine Mills, Inc.,* 211 Or. 378, 315 P.(2d) 566, is clear authority to the contrary. There the Oregon court stated (pp. 398-399, 402-403):

> "In *Hughes v. Heppner Lumber Co.,* 205 Or 11, 15, 283 P2d 142, 286 P2d 126, this court said: 'What is merchantable timber, in the absence of agreement, is a question of fact.' Again, in the opinion on rehearing, the court said:
>
> > " 'As pointed out in Dahl v. Crain, 193 Or 207, 237 P2d 939, it is difficult to define merchantable timber which will fit all occasions in all localities. It has no definite fixed meaning and many factors must be considered in a given case in determining what is or is not merchantable.' 205 Or at 57.
>
> "In *Dahl v. Crain,* supra, 193 Or 207, 225, 237 P2d 939, this court said:
>
> > " 'It may be conceded that there is no definition of "merchantable timber" which will fit all occasions and all localities. Although a term very frequently used in timber sales contracts, as it was used in the contract here, nevertheless, it

> is one having no definite and fixed meaning. What may be "merchantable timber" at one time or place may not be deemed such at another time or place. In determining what is covered by the term at a particular time and in a particular locality many factors are considered. Size and quality are of prime importance. Location, accessibility, demand, and market conditions are regarded. We do not assume to enumerate all the elements involved in the term. * * * '

"Again, in *Parsons v. Boggie,* 139 Or 469, 11 P2d 280, the contract called for the sale of 'all good merchantable timber' on certain land. This court said:

> " ' * * * The court must, as far as possible, construe the instrument from the words used as showing what the parties had in mind at the time of its execution. The respondent sold and the appellant bought with the understanding that the timber was to be removed. We must also take into consideration the circumstances surrounding the parties at the time the sale was made; also their attitude toward the subject matter subsequent to the execution of the contract. * * * '

"The conclusion to be drawn from these cases is that the term 'merchantable timber' in and of itself involves some ambiguity requiring a consideration of the surrounding circumstances and the 'attitude toward the subject matter subsequent to the execution of the contract', i.e., the practical construction placed upon the contract by the parties."

* * * * *

"The trial court having correctly found that the contract was ambiguous proceeded to take testimony for the purpose of ascertaining the true intent and meaning of the contract under the rules governing construction in cases of ambiguity. In such an inquiry it was the duty of the court to consider all

circumstances accompanying or surrounding the transaction, giving great weight to the principal apparent purpose of the parties, and so far as possible, placing itself in the position of the contracting parties. ORS 42.220; *Barmeier v. Oregon Physicians' Service,* 194 Or 659, 672, 673, 243 P2d 1053; *Erickson v. Grande Ronde Lumber Co.,* 162 Or 556, 580, 92 P2d 170, 94 P2d 139; *Haynes v. Douglas Fir Exploitation and Export Co.,* 161 Or 538 at 549, 90 P2d 207, 761; *Teiser v. Swirsky,* 137 Or 595 at 604, 2 P2d 920, 4 P2d 322; *Jaloff v. United Auto Indemnity Exchange,* 120 Or 381, 388, 250 P 717. The court must be guided by the familiar provisions of statute concerning the interpretation of writings ORS 42.210 to 42.260 inclusive. It must take note of ORS 41.740, the statutory parol evidence rule and the proviso therein that 'this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, * * * .' *Garrett v. Eugene Medical Center,* 190 Or 117, 130, 224 P2d 563. It must apply the familiar rule that

> " 'The practical interpretation of the terms of a contract made by the parties while performing it is universally deemed a safe guide to the intended meaning of the instrument.' *Kontz v. B. P. John Furniture Corp.,* 167 Or 187, 115 P2d 319.

"See also, *Miles v. S. P. & S. Railway Co.,* 176 Or 118, 125, 155 P2d 938; *Nunner v. Erickson,* 151 Or 575, 612, 51 P2d 839; *Wood v. Davin,* 122 Or 74, 78, 257 P 690; *Davis v. North Bank Dock Co.,* 294 F 336."

Thus, it is clear under Oregon law that "merchantable timber" is a term which has no definite or fixed meaning. The court is required to consider the surrounding circumstances, and the practical construction placed

upon the contract by the parties subsequent to its execution in arriving at their intent. In determining what is covered by the term, the court must take into consideration various factors, including size, quality, location, accessibility, demand and market conditions. Only after the court has determined what is "merchantable" does the rule apply that the grant of merchantable timber is that which was on the land at the date of the contract.

The court's opinion (R. 496-499), as well as its findings of fact, clearly shows the correct application of the Oregon law in its determination that all of the fir and hemlock timber removed from the lands was in fact merchantable on May 4, 1942.

A. *Circumstances surrounding the sale.*

Mr. Marvin T. Warlick, who made the 1942 timber contract, proposed the sale to Mr. Davidson of Siuslaw at a time when timberlands which Siuslaw owned bordered upon Warlick's land (R. 214). He insisted that he would not sell the old growth timber unless Davidson took the second growth. He believed that in the process of logging the old growth, the second growth would be pretty well cleaned out anyway (R. 215). He understood that the lump-sum price covered "all of the timber on the place" and that "There was no timber reserved" (R. 220). Plaintiff quotes Warlick as stating on cross-examination that Davidson told him Siuslaw was not interested in anything but the old growth timber and argues that the record is "abundantly clear"

that both Davidson and Warlick knew the difference between buying "merchantable timber" and all of the timber on a piece of property (App. br. pp. 31-32). However, the testimony clearly shows that the statement was made the first time they talked about a possible sale, and that the deal was consummated six, seven or eight months later following many other conversations. It was during these further negotiations that Warlick insisted that Siuslaw must take the second growth (R. 214-215).

Mr. Davidson, one of the incorporators of Siuslaw and its resident manager at Mapleton, Oregon, confirmed the fact that the only species of timber reserved from the contract was cedar (R. 276). He believed that Siuslaw was to have all of the timber (R. 282-283). Plaintiff baldly states that Mr. Davidson " . . . testified that he was not negotiating for the second growth timber" (App. br. p. 31), because he answered that he did not remember if there was any discussion about the second growth timber at that time (R. 275). However, the record clearly shows that counsel's time limitation referred to the time when a cruise of the timber had been completed, which was sometime prior to the making of the contract and prior to the completion of negotiations (R. 274). According to Mr. Warlick, the contract was entered into "after negotiations for a number of days or weeks" following the completion of Davidson's cruise (R. 216).

Mr. Gonyea, who was Mr. Davidson's assistant at the time, sat in on several of the discussions regarding

the 1942 timber purchase (R. 298). He testified: "There was nothing to be reserved by Mr. Warlick except a few cedar trees, as I understand or remember it" (R. 303). On cross-examination, he stated that Siuslaw acquired the timber that was on the land (R. 310). He also confirmed the discussion about second growth timber between the parties " . . . in that Mr. Davidson would bargain for the stuff" (R. 315). He could not see any inconsistency between the language of the contract and what he thought Siuslaw would get, i.e., "all of the timber" (R. 319).

That the trial court believed this testimony which was not impeached is shown by reference in its opinion to the testimony of these witnesses (R. 498).

B. *Practical construction of the contract.*

When Mr. Warlick sold the land to the Tucker brothers in the fall of 1942, he told them that he had sold the timber. Of course, the deed contained a specific reservation to that effect (R. 52, 227-228). Concerning a conversation with one of the Tucker brothers as to the execution of an assignment of all claims against defendant, plaintiff testified on a pretrial deposition that "he [Tucker] didn't feel like he had any [claim]" (R. 123). In fact, plaintiff admitted that at the time he bought the land from the Tuckers, he did not think he was buying any timber and Mr. Tucker did not represent that plaintiff was getting any timber (R. 119-120).

As pointed out by the court, plaintiff never claimed that second growth timber was not merchantable until

November 23, 1956, when the amended complaint was filed (R. 5), six months after the commencement of this action in the state court (R. 499). Furthermore, plaintiff does not challenge the correctness of Finding of Fact XXII to the effect that during the period he owned fee title to the lands, he requested and received reimbursement from defendant or Siuslaw of fire patrol assessments and that portion of the real property taxes allocable to the timber (R. 59-60). This reimbursement was made pursuant to the provisions of the agreement of May 4, 1942, that Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)" (R. 51).

Finally, the logging contract between plaintiff and defendant entered into under date of August 10, 1955, provided specifically "That the Owner owns the timber on certain lands hereinafter described . . ." (Deft. Ex. 68), including portions of plaintiff's lands.

Thus, the court's explicit Finding of Fact XXIV (R. 60-61) is supported by very cogent evidence. There the court found that plaintiff's conduct in obtaining reimbursement of taxes and assessments and in failing to object to the cutting and removal of timber evidenced his "knowledge of the intention of the original parties to the contract." The court further found that by entering

into and performing the 1955 logging contract, plaintiff evidenced ". . . his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto" (R. 61).

C. *Other facts relating to merchantability of the second growth fir and hemlock in May,* 1942.

Plaintiff baldly states that the expert witnesses testified without contradiction that the second growth timber was in fact not merchantable on the date of the contract, and that defendant produced no evidence that the second growth timber on plaintiff's property was merchantable on May 4, 1942 (App. br. pp. 34, 37). Both assertions are preposterous in the light of the testimony.

The only so-called expert witnesses referred to by plaintiff are Herbert R. Jones and Fred Buss. While Jones did testify on direct examination that in his opinion the only merchantable timber in 1942 would be the old growth timber, his testimony was rendered worthless by his frank admission on cross-examination that he did not claim to be an expert on timber in Lane County in 1942, for he had not come to the county until 1941 (R. 165). He stated that one of the ultimate tests of merchantability is salability, but he had no knowledge of what the practices were in Lane County with regard to the merchantability and salability of second growth timber (R. 169).

With respect to the testimony of Mr. Buss, it is

sufficient to note that on cross-examination he admitted that in his thinking nothing was merchantable that was not profitable (R. 451). The court properly rejected this test of merchantability in line with the decision of the Supreme Court of Oregon in *Dahl v. Crain,* 193 Or. 207, 237 P.(2d) 939. In his memorandum opinion, Judge Solomon stated (R. 497):

> "The mere fact that in one year, or even in several years, second-growth could not be converted into timber profitably does not render the timber unmerchantable. If that were the case, during a depression one would have to hold that the best stands of old-growth timber which were on excellent terrain, either right next to a mill or on the road, were unmerchantable because the timber could not be sold at a profit."

Defendant's witnesses whose testimony supported the court's finding that the second growth fir and hemlock in question were of commercial value on May 4, 1942, were Wilford H. Gonyea, Arthur S. Davidson, Orval Phelps and Frank A. Graham.

Gonyea testified that in 1942 second growth timber in Lane County was made into poles and piling, as well as dimension lumber, car-decking, studs and general construction material (R. 296-297). He confirmed the fact that in 1942 there were lumber mills in Lane County which were substantially engaged in manufacturing second growth timber into lumber products (R. 304). With respect to hemlock, he testified as to the market for pulp logs used in the manufacture of paper by Crown-Zellerbach and Oregon Pulp & Paper Company (R. 305).

Davidson, who came into the Mapleton area in 1939, testified that Siuslaw was logging second growth timber in the vicinity in 1941 and that there was then a growing market for second growth poles and piling (R. 279).

Phelps, an experienced logger and lumber operator in the Mapleton area, testified as to his manufacturing activities in the early 1940's in which he utilized second growth exclusively for bridge planks and railroad ties (R. 324-328). He named several other lumber operators who were then operating in Lane County exclusively on second growth timber (R. 329).

Frank A. Graham was called to testify as to the retail market for second growth timber in Lane County in the 30's and 40's. He was questioned in some detail as to the various end products manufactured from second growth timber and emphasized the rising demand for lumber in the years immediately preceding the commencement of World War II (R. 360). Asked whether the retail market in 1941 and 1942 was just as good as the old growth retail market, the witness answered, "Definitely" (R. 360-361). He went on to describe many mills operating in Lane County in 1942 which were exclusively engaged in the manufacture of second growth lumber in the period 1940-1942 (R. 361-363).

Even plaintiff's witness Jones admitted that the second growth timber on the Seaver property was suitable for manufacture into ties, bridge decking and studding (R. 463-464).

Without reviewing the record in further detail, it is abundantly clear that the testimony of these witnesses and Mr. Gibson and Mr. Sanders adequately supports Findings of Fact XII, XIII, XIV, XVI, XX and XXI as made by the court (R. 54-56, 57, 59).

There appears to be an implication in plaintiff's brief that the finding as to merchantability is contradicted by Finding of Fact XV (R. 56), which states that the Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged road and rough area in which no logging roads had been constructed (App. br. p. 33). However, the record clearly shows that the immediate inaccessibility was only a temporary factor which in no sense detracted from the commercial value of the second growth fir and hemlock timber. Davidson testified that by 1942 Siuslaw's holdings extended right up to the Seaver tract and that only four additional miles of logging road need be built to reach this timber (R. 259). In any event, Siuslaw, which owned over 200,000,000 feet of timber in the area (R. 257), had a long-range program of buying timber for conversion at a later time. The contract of May 4, 1942, which contained a 20-year cutting period, and an additional five years if necessary for completion, was based on Siuslaw's program to cut a lot of other timber first (R. 221).

An extended discussion of this point is unnecessary, since plaintiff's witness Jones testified that at least the old growth timber on the tract (though equally inaccessible) was merchantable in 1942 (R. 156). On

cross-examination, he confirmed the fact that timber stands which are wholly inaccessible are frequently sold (R. 173).

Of course, the logic of the court's construction of the terms of the contract alone is most persuasive (R. 497):

> "If no second-growth timber is merchantable, why in the world would the parties have inserted a statement in the contract that they were selling second-growth timber? This is not a case of two people who didn't know the business. On one side we had Mr. Davidson representing the company, and on the other side Mr. Warlick. I don't think that either of them, particularly Mr. Davidson, would have put in a useless phrase 'merchantable second-growth' if there wasn't any merchantable second-growth."

In any event, in view of the court's construction of the terms of the agreement alone as manifesting the intent of the parties that the second growth fir and hemlock was merchantable on May 4, 1942, it is clear that the admission of extrinsic evidence as to intent could not be deemed reversible error. Even if the evidence to which plaintiff objects be disregarded, there is ample support for the findings made by the trial court. On appeal, it will be presumed that the trial judge considered only competent evidence (*Wells v. J. C. Penney Company,* 250 F.(2d) 221, 235 (CA 9)).

III

The trial court's findings that neither defendant nor Siuslaw ever relinquished or abandoned its rights to the fir and hemlock timber are also supported by credible oral testimony.

Plaintiff's alternative theory of recovery for timber removed from the tract subsequent to January 1, 1953, rests upon the proposition that defendant and Siuslaw had abandoned this timber and had released all interest therein.

In support of this position, plaintiff relies upon the fact that on the first cutting only 1,031,000 feet of second growth fir timber was cut, that 3,125,000 feet was removed after January 1, 1953, and that this logging was done subsequent to the filing of timber removal affidavits with the tax assessor of Lane County.

Findings of Fact XVIII and XXV (R. 58, 61-62) completely refute plaintiff's position. They are clear and comprehensive and are based primarily on the testimony of Frank McPherson (R. 378-383, 387-390). In his opinion, Judge Solomon stated that he was "impressed" with McPherson's testimony. The court thought ". . . he was a particularly good witness" (R. 495).

At the trial and before this Court, plaintiff contends that under the case of *Hughes v. Heppner Lumber Co.*, 205 Or. 11, 283 P.(2d) 142, 286 P.(2d) 126, the filing of the timber removal affidavits constituted abandonment as a matter of law. In its opinion, the trial court

distinguished the *Heppner* case on its facts from the case at bar (R. 494-496). The difference in status and authority between McPherson and the corporate officers of Heppner Lumber Company; the continued logging here as contrasted with Heppner's failure to make any claim for three years; the continued payment of taxes by defendant as distinguished from the termination of tax payments by Heppner; and, particularly, the acceptance of McPherson's testimony as contrasted with the rejection of the innocent explanations of the Heppner officers by the Oregon Supreme Court, were all factors which persuaded the trial court that the *Heppner* case was not in point.

Judge Solomon stated that he did not understand *Hughes v. Heppner Lumber Company* "to require a finding of abandonment, even where a false affidavit has been filed in the face of clear and convincing evidence to the contrary" (R. 496). The court's view of the *Heppner* case is confirmed by Judge Brand's statement in *Doherty v. Harris Pine Mills, Inc.*, 211 Or. 378, 315 P.(2d) 566, as to the actual holding of the court in the *Heppner* case, where there was no specific time limitation in the contracts for the removal of timber (pp. 423-424):

> "Finally, we come to *Hughes v. Heppner Lumber Co.*, supra, 205 Or 11, 283 P2d 142, 286 P2d 126. In February 1939 plaintiffs deeded to the predecessor of defendant all pine and merchantable fir timber on 116 acres of land here involved. Two days later the grantee of the timber conveyed to the plaintiffs 692 acres of the land in litigation, reserving all of the pine and merchantable fir timber thereon 'with the right to log the same at its

convenience.' The defendant succeeded to the rights in the reserved timber. This court stated the issue thus: 'did defendant remove all the merchantable timber as contemplated by the parties in 1939, during the years 1939 to 1948, inclusive?' The court continued:

> " 'The parties agree on the issues, at least in respect to this question. Defendant claims and plaintiffs disclaim that the timber now contended for was merchantable timber in 1939. Defendant asserts therefore that they have a reasonable time to remove it. If the timber, however, was not merchantable at that time it follows that the "reasonable time for removal" doctrine would have no applicability.
>
> " 'A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. Rayburn et ux v. Crawford et ux., 187 Or. 386, 398, 211 P2d 483.' 205 Or at 14.

"The defendant after 1948 ceased to log and made no claim to any remaining timber until 1951 when the price had 'soared some 400 per cent.' The majority of the court held that in 1951 a reasonable time for removal of the reserved timber had expired. Two judges dissented on this issue but they agreed with the majority on the time as of which merchantability and size are to be determined."

In the other Oregon case relied upon by plaintiff at the trial (R. 379), *Kergil v. Central Oregon Fir Supply Company,* 213 Or. 186, 323 P.(2d) 947, the only question was whether oral evidence denying the validity of a written lease was admissible where the clear purpose of the lease was to defraud and mislead the government. The court refused to allow the deceiver to profit by its fraud. This is clearly distinguishable from the case at bar where the district court upon an appraisal of oral testimony

found that McPherson ". . . made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived" (R. 62).

Under these circumstances, this Court should follow its well-settled rule that the considered view of the local district judge as to the proper interpretation of state appellate court decisions will be accepted, in the absence of clear error (*People of the State of California v. United States,* 235 F.(2d) 647, 654 (CA 9); *Citrigno v. Williams,* 255 F.(2d) 675 (CA 9); *Bower v. Bower,* 255 F.(2d) 618 (CA 9)).

IV

The trial court correctly concluded that plaintiff had consented to the removal of all the fir and hemlock timber.

Plaintiff claims that the trial court erred in entering Conclusion of Law IV to the effect that he consented to the removal by defendant and Siuslaw of all the fir and hemlock for which he claimed damages herein (R. 64), and it is urged that "there was no evidence to support a conclusion that appellant knowingly consented to anything" (App. br. p. 16).

There was ample evidence from plaintiff's own testimony that he was thoroughly familiar at all times with the logging operations being conducted on the property (R. 106-107). He admitted that from the time he acquired an interest in the property he had no objection to

the taking of the timber (R. 136). No objection was ever voiced until the spring of 1956 after all the timber in question had been cut and removed (R. 54). Under the Oregon law, as stated in *Schiffman v. Hickey,* 101 Or. 596, 200 Pac. 1035, consent is a complete defense to a trespass action; it may be shown by conduct as well as by words; and knowledge and failure to object constitute the elements of consent.

Plaintiff's argument that he did not learn of his alleged cause of action for timber trespass until the spring of 1956 amounts only to an assertion that prior to that time he was acting under a mistake of law. However, in this case it is wholly immaterial that his consent was based, as contended by plaintiff, upon a mistaken interpretation of the terms of the May 4, 1942, agreement.

Under the general rule of the *Restatement of Torts,* Section 892, Comment b, and *Prosser on Torts* (2d Ed.), p. 85, consent resulting from a mistake of law protects an actor from liability unless he knows or should have known that the manifestation is the result of a mistake by the other party, or unless the other's mistake has been induced by the actor's misleading conduct. In this case, there can be no claim that defendant knew or should have known that plaintiff was acting under a mistake of law, or that defendant was guilty of any misleading conduct.

V

Under no circumstances could defendant be liable for treble damages imposed by ORS 105.810.

While the question appears quite academic, plaintiff argues that treble damages for the cutting and removal of second growth fir and hemlock timber should have been awarded because ". . . it is clear from defendant's conduct that its removal of the second growth timber was wilful and intentional, and there is no evidence that it was casual or involuntary or that it had probable cause to believe that it owned the timber" (App. br. p. 47).

Again, plaintiff's argument runs directly contrary to the clear and comprehensive findings of fact, particularly Finding of Fact XXVII which states (R. 62-63):

> "Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a *bona fide* belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942."

There is very substantial evidence in the record to support this finding, but it will be sufficient only to mention a few points: (1) the stipulated Finding of Fact XI to the effect that plaintiff made no objection to the quantity, quality, size or species of timber cut and removed until the spring of 1956 (R. 54); (2) Finding of Fact XXII (to which plaintiff has made no objection) to the effect that during the period of cutting and re-

moval plaintiff requested and received reimbursement from defendant or Siuslaw of fire patrol assessments on that portion of the real property allocable to the timber (R. 59-60); (3) McPherson's testimony that when the logging was being done, he in good faith believed that all of the timber being taken off the tract belonged to defendant (R. 387).

Nevertheless, plaintiff argues that "Appellee's belief, bona fide or otherwise, has no effect upon the imposition of treble damages under the Oregon statutes" (App. br. p. 14). This view of the Oregon law is contrary to the trial court's ruling with respect to the demand for treble damages on account of the five cedar trees cut. In awarding double damages of $80.00, Judge Solomon stated that he could not attribute ". . . malice and evil intent to the company . . ." (R. 500).

This necessary element of malice or evil intent in order to impose treble damages is thoroughly discussed by the Oregon Supreme Court in *Kinzua Lumber Co. v. Daggett,* 203 Or. 585, 281 P.(2d) 221, where the double damage statute (ORS 105.815) was distinguished from the treble damage section (ORS 105.810) as follows (pp. 590-591, 593):

> "The section is concerned solely with the taking, and not with the state of mind of the offender. If the taking was attended with a malign purpose, the wrongdoer is subject to ORS 105.810 which renders material the intent of the wrongdoer."
>
> * * * * *
>
> "Since ORS 105.810 makes provision for the recovery of treble damages from anyone who 'wilfully injures' a tree, and, going on, prescribes the

> manner in which the evil purpose may be established, we cannot, by the process of judicial interpretation, infuse into ORS 105.815 the word 'wilful'. Accordingly, ORS 105.815 deals with trespassers who have no evil intent."

As specifically noted in *McHargue v. Calchina,* 78 Or. 326, 330, 153 Pac. 99, the "harsh rule" of *Loewenberg v. Rosenthal,* 18 Or. 178, 23 Pac. 601, relied upon by plaintiff (App. br. pp. 48-49), was modified by a later decision. The *McHargue* case was followed in *Siuslaw Timber Co. v. Russell,* 91 Or. 6, 178 Pac. 214, where the Oregon rule was stated (p. 10):

> "Whatever may be the conclusion in other jurisdictions, it is settled in this state that the burden is upon the plaintiff to establish the trespass, and that it was committed by the defendant with knowledge that he was trespassing, before there can be a recovery of the penalty of treble damages."

The other case cited by plaintiff on this point is *Longview Fibre Co. v. Johnston,* 193 Or. 385, 238 P.(2d) 722, where treble damages were demanded. The trial court merely awarded double damages, and the Supreme Court of Oregon affirmed this judgment (see *Kinzua Lumber Co. v. Daggett,* 203 Or. 585, 589, 281 P.(2d) 221).

CONCLUSION

The findings of fact are based upon stipulated facts and oral testimony accepted as credible by the trial judge. The court below carefully and correctly evaluated and applied the controlling Oregon law.

The judgment appealed from should be affirmed.

Respectfully submitted,

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